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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JAMARIEL VALERY, Defendant and Appellant.	A148965 (Contra Costa County Super. Ct. No. 51519271)

A jury convicted Jamariel Valery of conspiracy to commit a felony (Pen. Code, § 182, subd. (a)(1) [Count 1])[1] and carrying a loaded, unregistered firearm in a vehicle (§ 25850, subds. (a) & (c) [Count 5]), and found true the related gang enhancements. The trial court suspended imposition of sentence and placed him on probation for three years, subject to various conditions. Valery contends the condition requiring him to obtain his probation officer's permission before changing his place of residence or traveling out of state (residency/travel condition) is invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and unconstitutionally overbroad. The Attorney General states, and Valery concedes, that the stay of probation on Count 1 constitutes an unauthorized sentence. We agree that the stay of probation on Count 1 must be vacated. As modified, we affirm the order of probation.

[1] All further undesignated statutory references are to the Penal Code.

I. BACKGROUND

On August 19, 2015, Richmond Police Department officers, Enrik Melgoza and Christopher Llamas, conducted a traffic enforcement stop on a vehicle for a traffic violation. The driver, later identified as Valery, complied with the request to pull over. As the car came to a stop, Officer Melgoza saw the rear passenger immediately hunch down. Officer Llamas approached the driver's side of the car, while Officer Melgoza approached the rear passenger side. Officer Llamas observed Valery wearing a hat specific to north Richmond gangs. Officer Melgoza immediately recognized the rear passenger and front passenger from prior contacts as Myron Skinner and Idris Jamerson, respectively. Officer Melgoza smelled marijuana coming from the car.

Officer Melgoza asked Skinner to exit the car, pat-searched him and did not find any weapons, and detained him in handcuffs on the curb. Melgoza then took a white cell phone from Jamerson's lap and had him step out of the car. Officer Melgoza pat-searched Jamerson and found a black semiautomatic .40 caliber loaded handgun in Jamerson's right jacket pocket. Jamerson was placed in the police car with his hands cuffed behind his body. Officer Melgoza then lifted up the front passenger seat and found a black and silver .45 caliber semiautomatic handgun, which was later determined to be loaded.

As Officer Melgoza walked back to his patrol car, he saw Jamerson hunched over an illuminated cell phone, which he appeared to be manipulating with his right hand. Melgoza retrieved the phone and saw a text message which said, "Shit. Drive [*sic*]. Looking for a lick. What's up with niggas." Melgoza testified that in his 8 years as a law enforcement officer the word "lick" always referred to a robbery. Melgoza testified that Valery admitted the phone Jamerson was holding belonged to him. The text was sent earlier that afternoon. Valery was not found with a gun.

Valery, along with codefendants Jamerson and Skinner were charged in a seven-count information with conspiracy (Count 1), attempted second degree robbery (Count 2), second degree robbery (Count 3), street terrorism (Count 4) and firearm offenses

(Counts 5, 6 &7). Various enhancements were also alleged. The codefendants were convicted of the street terrorism and gun charges before Valery's trial.

Valery was tried on an amended information charging conspiracy to commit robbery as charged in Count 3 (overt act No. 1) and conspiracy to carry loaded, unregistered handguns while in a vehicle in a public place as charged in Count 5 (overt act No. 2) (Pen. Code, § 182, subd, (a)(1); [Count 1]), second degree robbery with the personal use of a firearm (§§ 211, 12022.53, subd. (b); [Count 3]), and carrying a loaded, unregistered firearm in a vehicle (§ 25850, subds. (a) & (c)(6); [Count 5]), with street-gang enhancements (§ 186.22, subd. (b)(1)(A)(B) &(C)) in each count. The jury convicted Valery in Counts 1 and 5, and found the gang allegations true; it acquitted Valery on Count 3. The court suspended imposition of sentence and granted court probation on Count 5, for three years subject to various conditions. The court ordered the same probation term and conditions on Count 1, but "stayed" the sentence pursuant to section 654. Defense counsel did not object to the conditions of probation.

Valery filed a timely appeal.

II. DISCUSSION

Valery challenges the following condition of probation: "You may not change your place of residence or leave the State of California without your probation officer's permission." Valery maintains that this condition is unreasonable and therefore invalid under *Lent, supra,* 15 Cal.3d 481. He also contends this condition is unconstitutionally overbroad.

As Valery acknowledges, however, his trial counsel did not object to this probation condition on these or any other grounds. Valery asks us to exercise our discretion to reach the merits even in the absence of an objection; in the alternative, he contends his counsel rendered ineffective assistance by failing to object.

A. Applicable Law and Standard of Review

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the

breach of law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' " (*People v. Moran* (2016) 1 Cal.5th 398, 402–403 (*Moran*), quoting § 1203.1, subd. (j).) Thus, "a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1,' " and an appellate court generally reviews probation conditions for abuse of discretion. (*People v. Moran*, at p. 403, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) However, we review constitutional overbreadth challenges to probation conditions de novo. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754.)

"As a general rule, failure to challenge a probation condition on constitutional or *Lent* grounds in the trial court waives the claim on appeal." (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033; *People v. Welch* (1993) 5 Cal.4th 228, 237 (*Welch*) [*Lent* grounds]; *In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); *People v. Trujillo* (2015) 60 Cal.4th 850, 856.) This rule is intended to " 'encourage parties to bring errors to the attention of the trial court, so they may be corrected.' " (*Sheena K.*, at p. 881.) An exception exists, however, where a party raises a *facial* challenge to a condition of probation as constitutionally vague or overbroad that can be resolved without reference to the sentencing record in a particular case. (*Id*. at p. 887.) In reaching this conclusion, our high court emphasized that it "d[id] not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' " (*Id*. at p. 889.)

B. Reasonableness of the Residency/Travel Condition

Under *Lent, supra,* 15 Cal.3d 481, a condition is "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably

related to future criminality.' " (*Id.* at p. 486.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) Valery argues that the residency/travel condition is unreasonable because it has no relationship to his crime or future criminality. Valery's challenges to the reasonableness of the probation condition requiring permission to move or leave the state unquestionably depend on a review of the facts of this case.

In *Welch*, the court explained why the waiver rule should apply to *Lent* claims: "A timely objection allows the court to modify or delete an allegedly unreasonable condition or to explain why it is necessary in the particular case. The parties must, of course, be given a reasonable opportunity to present any relevant argument and evidence. A rule foreclosing appellate review of claims not timely raised in this manner helps discourage the imposition of invalid probation conditions and reduce the number of costly appeals brought on that basis." (*Welch, supra,* 5 Cal.4th at p. 235.) The court distinguished, as exempt from the waiver rule, cases involving "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." (*Ibid.*)

Here, to the extent Valery argues the challenged condition violates *Lent, supra,* 15 Cal.3d 481, we find that argument forfeited. (*Welch, supra,* 5 Cal.4th at p. 237.) To avoid forfeiture, Valery maintains that his counsel was prejudicially ineffective by failing to challenge the reasonableness of the residence/travel condition. To prevail on a claim of ineffective assistance of counsel, Valery must show (1) his counsel's performance fell below the objective standard of reasonableness; and (2) he was prejudiced as a result. (*People v. Weaver* (2001) 26 Cal.4th 876, 961; *Strickland v. Washington* (1984) 466 U.S. 668, 688.) If, as here, the record on appeal sheds no light explaining why counsel acted or failed to act in the manner challenged, we must reject the claim of ineffective assistance of counsel unless there can be no satisfactory explanation for counsel's conduct. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

For example, defense counsel could reasonably conclude an objection would be futile. "Imposing a limitation on probationers' movements as a condition of probation is common, as probation officers' awareness of probationers' whereabouts facilitates

supervision and rehabilitation and helps ensure probationers are complying with the terms of their conditional release. (See, e.g., *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 220 [probation condition prohibited defendant from leaving the state without permission]; *People v. Vogel* (1956) 46 Cal.2d 798, 806 (dis. opn. of Shenk, J.) [same]; *People v. Cruz* (2011) 197 Cal.App.4th 1306, 1309 [probation condition prohibited defendant from leaving the county or state without permission].)" (*Moran, supra,* 1 Cal.5th at p. 406.)

Also, as a tactical matter, counsel could have reasonably decided to forego an objection on the grounds that demanding an option to change residences and leave the state at will might have raised legitimate concerns about Valery's suitability for probation and the necessary supervision that probation entails. (See *Welch, supra,* 5 Cal.4th at p. 237.) For these reasons, the record is inadequate to adjudicate the ineffectiveness claim, and the challenge to the reasonableness of the residency/travel condition is forfeited.

C. Constitutionality of the Residency/Travel Condition

Valery next claims this condition violates his constitutional rights to travel and freedom of movement. Acknowledging that he did not challenge the constitutionality in the trial court, he asserts this claim raises a question of law that should be reviewed by this court. (See *Sheena K., supra,* 40 Cal.4th at pp. 888–889.)

"If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355.) The right to travel and freedom of association are undoubtedly "constitutional entitlements." (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944.) "[W]here an otherwise valid condition of probation impinges on constitutional rights, such conditions must be carefully tailored, ' "reasonably related to the compelling state interest in reformation and rehabilitation . . . ." ' " (*Id.* at p. 942.)

In *Sheena K.,* the minor was placed on probation subject to the condition that she not "associate with anyone 'disapproved of by probation.' " (*Sheena K., supra,*

40 Cal.4th at p. 890.) On appeal, despite having not objected to the condition in juvenile court, the minor asserted that the condition was unconstitutionally vague and overbroad. (*Ibid.*) Noting that the challenge presented a pure question of law based on the face of the condition, our high court determined that the minor did not forfeit the challenge on appeal. (*Id.* at p. 889.) Addressing the claim on the merits, the court determined that absent a knowledge requirement, the condition was unconstitutionally vague. The court explained, " '[B]ecause of the breadth of the probation officer's power to virtually preclude the minor's association with anyone,' defendant must be advised in advance whom she must avoid." (*Id.* at p. 890.) The Supreme Court revised the condition to specify that the probationer need avoid only those individuals " 'known to be disapproved of' by [the] probation officer." (*Id.* at p. 892.)

Like many appellants before him, Valery cites to *Sheena K.*to avoid forfeiture. In considering this issue, we are mindful of the California Supreme Court's advice in considering whether a challenge to a probation condition has been forfeited: "We caution, nonetheless, that our conclusion does not apply in every case in which a probation condition is challenged on a constitutional ground. As stated by the court in *Justin S.*, [*supra*, 93 Cal.App.4th 811] we do not conclude that 'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.] In those circumstances, "[t]raditional objection and waiver principles encourage development of the record and a proper exercise of discretion in the trial court." [Citation.]' [Citation.] We also emphasize that generally, given a meaningful opportunity, the probationer should object to a perceived facial constitutional flaw at the time a probation condition initially is imposed in order to permit the trial court to consider, and if appropriate in the exercise of its informed judgment, to effect a correction." (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.)

Here, Valery challenges the condition as unconstitutionally overbroad because it is not narrowly tailored to his "particular supervisory needs." In order to address this claim

we would need to consider Valery's crime and the supervisory resources available to him. Such an analysis does not present a pure question of law, but instead, requires consideration of the record. Such contemplation of the record is precisely why the California Supreme Court emphasized the importance of raising constitutional challenges in the lower court to allow that court to consider the specific argument instead of asking the appellate court to address the issue in the first instance on a cold record. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 889.) Accordingly, we conclude Valery's allegedly facial challenge is akin to his claim that the condition violates *Lent, supra,* 15 Cal.3d 481. We therefore determine Valery forfeited his claim that the condition is overbroad because it is not specifically tailored to his specific rehabilitative needs.

Valery next claims the challenged condition is overbroad because it bestows the probation office with unfettered discretion to approve his residency and/or travel outside California without providing any standard to guide the approval process. We disagree. Because a probation restriction must be reasonably related to reformation and rehabilitation of the probationer (see *Bauer, supra,* 211 Cal.App.3d at p. 942), a probation officer's discretion to approve of a probationer's residence must be guided by the goal of reformation and rehabilitation. (Cf. *People v. Stapleton* (2017) 9 Cal.App.5th 989, 996 [probation officer "cannot use the residence condition to arbitrarily disapprove a defendant's place of residence"].) Although the trial court did not state its reason for imposing the condition, we can infer it has a legitimate purpose to deter future criminality via supervision.

Valery relies on *People v. O'Neil, supra,* 165 Cal.App.4th 1351, in which our colleagues in Division Three of this district court struck down an "entirely open-ended" (*id*. at p. 1359) and overly restrictive probation condition that prohibited the defendant from associating " 'socially, nor be present any time, at any place, public or private, with any person, as designated by your probation officer.' " (*Id.* at p. 1354.) The case is distinguishable, however, because a probation condition prohibiting a defendant from associating with or being in the presence of any person unless approved of by probation affects the daily activities of the defendant and is far more restrictive than a condition

involving a change of residence or out-of-state travel, which may come up only periodically within a probationary period. Furthermore, the condition in *People v. O'Neil* was considered overbroad because it was "unlimited and would allow the probation officer to banish [the] defendant by forbidding contact with his family and close friends, even though such a prohibition may have no relationship to the state's interest in reforming and rehabilitating [him.]." (*Id.* at p. 1358.) In contrast, there is no such risk of banishment. Instead, the condition actually keeps Valery close to his family in Richmond, where he was born and raised.

Moreover, there is nothing to suggest that Valery's reasonable requests to change his residence or travel out of state would be disapproved. We view the residency/travel condition here in light of our Supreme Court's admonition that probation conditions "should be given 'the meaning that would appear to a reasonable, objective reader' " (*People v. Olguin*, *supra*, 45 Cal.4th at p. 382, quoting *People v. Bravo* (1987) 43 Cal.3d 600, 606), and presume that a probation officer will not withhold approval for reasons that are irrational or capricious. (*Olguin*, at p. 383.) A "probation department's authority to ensure compliance with terms of probation does not authorize irrational directives by probation officer[s]." (*Ibid.*, citing *People v. Kwizera* (2000) 78 Cal.App.4th 1238, 1240–1241.)

D. Stay of Probation on Count 1

The trial court granted probation on Count 5 and stayed probation on Count 1. Specifically, it suspended imposition of sentence and granted probation for three years on the Count 5 gun conviction, in lieu of imposing sentence and suspending execution thereof. After ordering conditions of probation on Count 5, the court ordered the "exact same sentence" on the Count 1 conspiracy conviction, but directed its "sentence" on Count 1 be "stayed," ostensibly to avoid multiple punishment under section 654.

Neither party objected to the stay on Count 1, but the issue is not forfeited. A sentence that is unauthorized or in excess of jurisdiction—one that "could not lawfully be imposed under any circumstance in the particular case"—is reviewable "regardless of whether an objection or argument was raised in the trial and/or reviewing court." (*People*

v. Smith (2001) 24 Cal.4th 849, 852, internal quotation marks omitted.) "[T]he erroneous stay of sentence under section 654 is beyond the power of the sentencing court[.]" (*People v. Price* (1986) 184 Cal.App.3d 1405, 1412, internal quotation marks omitted.)

The parties are in agreement that the stay of probation was an unauthorized sentence. This claim of error is well taken. Where, as here, the imposition of sentence is suspended and the defendant is placed on probation, there is no punishment within the meaning of section 654, even if probation is conditioned on jail time. (See *People v. Wittig* (1984) 158 Cal.App.3d 124, 137; *People v. Stender* (1975) 47 Cal.App.3d 413, 425, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 240.) "Because sentence was not imposed . . . , there is no double punishment issue. The section 654 issue should be presented to a court upon any future attempt to impose a double punishment upon [the] defendant[] in the event of a probation violation." (*Wittig*, *supra*, at p. 137; accord, *People v. Martinez* (2017) 15 Cal.App.5th 659, 669, disapproved on other grounds in *People v. Ruiz* (2018) 4 Cal.5th 1100, 1122, fn. 8.)

Inasmuch as section 654 does not apply to the probation order, the order staying probation on Count 1 is unauthorized and is hereby vacated.[2]

III. DISPOSITION

The stay of probation on Count 1 is hereby vacated. In all other respects, the judgment is affirmed.

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[2] In light of this holding, we need not address the Attorney General's additional argument that section 654 was inapplicable to Count 1 because the longest potential for imprisonment was not the conspiracy conviction (Count 1) but the gun conviction (Count 5).

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Reardon, J.*

We concur:

_____
Streeter, Acting P.J.

_____
Tucher, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.